MF 06-11
Tax Type: Motor Fuel Use Tax
Issue: Dyed-Undyed Diesel Fuel (Off Road Usage)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	**Docket No. 00-ST-0000** **Account # 00-00000** **NTL # s 00-000000 0** **00-000000 0**
v.	
JOHN DOE and SMITH JONES Taxpayers	**Citation/warning # 0000-0000-0-00**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Kent Steinkamp, Special Assistant Attorney General for the Illinois Department of Revenue

Synopsis:

The Illinois Department of Revenue (hereinafter referred to as the "Department"), issued two Notices of Penalty for Dyed Diesel Fuel Violation (hereinafter referred to as the "Notices") to *John Doe*. The first Notice stated that *John Doe* failed to display the required dyed diesel fuel non-taxable use only sign on the container he was transporting. The second Notice stated that *John Doe* was the operator of a licensed motor vehicle that had dyed diesel fuel in its ordinary attached fuel tank. *Smith Jones* (hereinafter referred to as the "Taxpayer"), assumed the responsibilities of *John Doe* for the Notices, timely protested and requested a hearing. A hearing was held during which the Taxpayer admitted that the auxiliary tank did have dyed diesel fuel in it, argued that it was marked dyed diesel farm use and that the equipment used for the second test

must have been contaminated from the dye detected in the first test. It is recommended that this matter be resolved in favor of the Department. In support thereof, I make the following findings of fact and conclusions of law in accordance with the requirements of Section 100/10-50 of the Administrative Procedure Act (5 **ILCS** 100/10-50).

FINDINGS OF FACT:

1. The Department's *prima facie* case was established by admission into evidence of Dept. Ex. No. 1 under the certification of the Director of the Department. (Dept. Ex. No. 1; Tr. p. 8)

2. On April 20, 2006 *John Doe* was found to be operating a licensed motor vehicle that had dyed diesel fuel within its ordinary attached fuel tank. On January 20, 2006 the Department issued an ETS-51P Notice of Penalty for Dyed Diesel Fuel Violation in the amount of $2,500 for the violation. (Dept. Ex. No. 1)

3. On April 20, 2006 *John Doe* was found to have failed to display the required notice "Dyed Diesel Fuel, Non-Taxable Use Only" on an auxiliary fuel tank container he was transporting. On January 20, 2006 the Department issued an ETS-51P Notice of Penalty for Dyed Diesel Fuel Violation in the amount of $500 for the violation. (Dept. Ex. No. 1)

4. *Smith Jones*, owner/operator of *Doe* Trucking, employed *John Doe*. The vehicles involved belong to *Smith Jones* who is the responsible party concerning the Notices. (Dept. Ex. No. 1)

CONCLUSIONS OF LAW:

Paragraph 14 of the Motor Fuel Tax Act (hereinafter the "Act") (35 **ILCS** 505/1 et seq.), provides that:

> Any person who owns, operates, or controls any container, storage tank, or facility used to store or distribute dyed diesel fuel with out the notice required by Section 4f shall pay the following penalty:
> First occurrence……....$ 500
> (35 **ILCS** 505/14)

Section 4f of the Act states:

> A legible and conspicuous notice stating "Dyed Diesel Fuel, Non-taxable Use Only" must appear on all containers, storage tanks, or facilities used to store or distribute dyed diesel fuel. (35 **ILCS** 505/4f)

The Department's *prima facie* case was established by the admission into evidence of the Notices at issue. Section 21 of the Act incorporates by reference section 5 of the Retailers' Occupation Tax Act (35 **ILCS** 120/1 *et seq.*), which provides that the Department's determination of the amount of tax owed is *prima facie* correct and *prima facie* evidence of the correctness of the amount of tax due. 35 **ILCS** 505/21; 120/5. Once the Department has established its *prima facie* case, the burden shifts to the taxpayer to prove by sufficient documentary evidence that the assessment is incorrect. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991); Lakeland Construction Co., Inc. v. Department of Revenue, 62 Ill. App. 3d 1036, 1039 (2nd Dist. 1978)

Taxpayer agreed that the auxiliary tank did contain dyed diesel fuel. (Tr. p. 8) He also asserted that it was marked dyed diesel farm use only. (Tr. p. 9) Taxpayer produced no books or records to substantiate his claim that the container was so labeled.

In this case, Taxpayer produced no other evidence of its oral assertions about the notification on the auxiliary tank, other than testimony. To overcome the presumption of correctness of the Department's *prima facie* case a taxpayer must produce evidence identified with books and records kept by the taxpayer. Oral testimony is not sufficient. A. R. Barnes v. Department of Revenue, 173 Ill. App. 3d 826 (1st Dist. 1988); Masini v. Department of Revenue,

60 Ill. App. 3d 11 (1st Dist. 1978); Rentra Liquor Dealers, Inc. v. Department of Revenue, 9 Ill. App. 3d 1063 (1st Dist. 1973) In Branson v. Department of Revenue, 168 Ill. 2d 247 (1995) the court stated that where the terms of a statute are unambiguous, all elements of the penalty are established by the Department's assessment and certified record. "If the taxpayer offers no countervailing evidence, the Department's *prima facie* case stands unrebutted and becomes conclusive." *Id.* at 259 Taxpayer failed to overcome the Department's *prima facie* case with probable evidence.

Also at issue is paragraph 15 of section 15 of the Act, which provides:

> If a motor vehicle required to be registered for highway purposes is found to have dyed diesel fuel within the ordinary fuel tanks attached to the motor vehicle . . . , the operator shall pay the following penalty:
> First occurrence……..…… $2,500
> (35 **ILCS** 505/15-15)

Taxpayer's sole explanation regarding the dyed diesel fuel within the ordinary fuel tank of his truck was that the equipment that the investigator used must have been contaminated when it was first used to test the fuel in the auxiliary tank. (Tr. pp. 9-10) As the Taxpayer was not present at the testing (Tr. p. 11) this is mere speculation. Taxpayer presented a "Dye concentration check @ lab for rack" fax it received on March 23, 2006 as its only evidence. (Taxpayer's Ex. No. 1) He asserted that the fax establishes that the dyed diesel fuel he purchases has a minimum of 14 parts per million of dye pursuant to Environmental Protection Agency rules. Unfortunately for this Taxpayer, EPA rules have no relevance to the fact that he was found to have dyed diesel fuel in the tank of his truck. Again, he has provided no probative evidence to overcome the Department's *prima facie* case.

For the aforementioned reasons, it is recommended that the Notices issued on January 20, 2006 be upheld in their entirety. As *Smith Jones* appeared at the hearing and in the protest declared that he was the responsible party in this matter, it is recommended that the penalties be finalized against him.

Barbara S. Rowe
Administrative Law Judge
November 30, 2006